

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1048 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

BABUBHAI K SALAT

Appearance:

Ms Harsha Devnani, APP for Petitioner
MR MR VYAS for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE D.P.BUCH

Date of decision: 15/03/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.P.BUCH)

This is an acquittal appeal filed under Section

378 of the Code of Criminal Procedure, 1973 challenging the judgment and acquittal order dated 16.9.1985 recorded by the learned Sessions Judge, Banaskantha at Palanpur in Sessions Case No.61/84, under which the learned Sessions Judge acquitted the present respondent of offences punishable under sections 435 and 436 of Indian Penal Code. The facts may be stated in brief as follows:

2. On 9.5.1984, the original informant Bai Panchu, widow of Vishnubhai Ramjibhai, who was residing in a small hut in the outskirts of Palanpur in Banaskantha district, along with her companion Sangita, had gone for shopping. Her daughter, Lilaben aged 8 was present at the hut. It is alleged against the present respondent that the respondent had set fire on the said hut by throwing burning match stick and, therefore, the hut was burnt. One rickshaw driver informed the informant Bai Panchu and Sangita in the market about the incident. Therefore, they returned to the hut and witnessed that the hut was almost burnt, Bai Panchu enquired from her daughter Lilaben, who told her that the present respondent had set fire on their hut. Thereafter FIR was filed and the offence was registered against the present respondent for offences punishable under sections 435 and 436 of IPC. Panchnama was drawn in respect of the situation. Statements of other witnesses were also recorded and after conclusion of the said investigation, the Investigating Officer had filed charge-sheet against the present respondent for the aforesaid offences. The said offences being exclusively triable by the court of Sessions, the learned Magistrate committed the said case to the Court of Sessions. There it was registered as Sessions Case no.61/84. Before the Sessions Court, copies of police investigation papers were supplied to the respondent. Charge at Exh.4 was framed and it was read over and explained to the respondent. The respondent pleaded not guilty to the said charge and, therefore, the learned Sessions Judge proceeded to record evidence against the respondent. After recording the evidence produced by the prosecution, the learned Sessions Judge recorded further statement of the respondent under section 313 of the Criminal Procedure Code. Thereafter, opportunity was given to the respondent to examine defence witnesses and accordingly the respondent examined the witness on his behalf. Thereafter, the learned Sessions Judge heard the arguments advanced by the learned APP as well as by the learned Advocate for the respondent. Thereafter, the learned Sessions Judge came to a finding that the case against the respondent was not proved and, therefore, the learned Sessions Judge recorded judgment of acquittal of

the respondent from the said charges. While so doing the learned Sessions Judge has found that Lilaben is the solitary witness, that she was a child witness aged 8 years only and her evidence was not reliable and there is no corroboration to the said evidence though corroboration to the testimony of Lilaben was available. In that view of the matter, the evidence of the said witness was found not acceptable. Barring her evidence, there was no evidence to connect the present respondent with the incident. In that view of the matter, the learned Sessions Judge acquitted the present respondent of the said charge.

3. Feeling aggrieved by the said judgment and acquittal order of the learned Sessions Judge, the appellant-State has preferred this appeal before this court under section 378 of the Code. It has been mainly contended here that the learned Sessions Judge has discarded the evidence on record, that the learned Sessions Judge has committed serious error in acquitting the present respondent, that the learned Judge has not properly appreciated the evidence on record, that the learned Sessions Judge ought to have relied upon the evidence of the child witness, who would not normally falsely implicate the present respondent unless she has been tutored by the prosecution. That on the whole the judgment and acquittal order rendered by the learned Sessions Judge are illegal and erroneous and deserve to be set aside. It is, therefore, prayed that the present appeal be allowed and the judgment and acquittal order of the learned Sessions Judge be set aside and the present respondent be convicted for the aforesaid two offences punishable under Sections 435 and 436 of the I.P.C.

4. The appeal was admitted. At the time of hearing, Ms. Harsha Devnani, learned APP appears for the State. We have heard the arguments advanced by the learned APP who has taken us through the judgment of the learned Sessions Judge and the evidence on record both oral as well as documentary.

5. It is very clear that Bai Lilaben is the only witness to the incident produced by the prosecution to prove the case against the respondent. Lilaben is shown to be 8 years of age and her evidence has been recorded by the trial court without giving oath to her. The learned Sessions Judge made preliminary enquiry and on such enquiry the learned Judge found that the child witness did not understand the sanctity of oath and, therefore, the oath was not given. Therefore, it is a matter in which her evidence has been recorded without

giving oath to her.

6. This witness has stated in her evidence that her mother Bai Panchu, the informant had gone with her companion Sangita for shopping and at that time, the respondent arrived there and had burnt the hut by throwing a burning match stick at the hut. That therefore, she went out of the hut and informed her uncle Hemchand Sindhi and thereafter, her mother and Sangita both had arrived there and she had conveyed the said fact to them also.

7. If we go through the evidence on record, we find that the prosecution has examined uncle of Lilaben, Hemchand Sindhi. Incidentally, Hemchand Sindhi has been examined at Exh.7 by the prosecution as panch witness in whose presence the panchnama about the scene of offence was drawn. It is interesting to note that Hemchand has been examined only as panch witness and not as a witness to the incident. The aforesaid fact was conveyed to him by the eye witness Lilaben soon after the occurrence of the offence. It is also interesting to note that this Hemchand Sindhi has given details as to how the hut was burnt, how the damage was caused etc. Thereafter, he also stated that daughter Lilaben had met him and had told him about the aforesaid incident. He never says during the course of his evidence that Lilaben has stated to him that the hut was burnt by the present respondent. Bai Lila had the first opportunity to disclose name of the respondent before Hemchand Sindhi. As said above, Hemchand Sindhi has made it clear that the name of the respondent was never disclosed to him by Lilaben. Therefore, this child witness has not conveyed the name of the respondent to Hemchand Sindhi when the event was first disclosed.

8. Another aspect of the case is that Hemchand Sindhi at Exh.7 also says that there are other huts near the hut of Bai Panchu. This means that other neighbours were also there and those witnesses were available to the prosecution for tendering evidence in order to prove the case against the respondent. Those witnesses could have been examined in order to prove that the huts were burnt by the respondent and by none else. These witnesses have not been examined and there is no further evidence on record to show that these huts were burnt by the respondent. The Learned Sessions Judge has considered the evidence of Lilaben and has observed that Lilaben is a child witness and her evidence has not been corroborated by available independent witnesses of hut occupants having their huts in the neighbourhood.

Therefore, the learned Judge did not find it proper to depend upon the evidence of (child witness) Lilaben. On appreciation of oral evidence on the record we find that the approach of the learned Sessions Judge cannot be said to be illegal or erroneous. If independent evidence is not available, then the child witness can be relied upon and even conviction can be passed on the solitary evidence of the child witness. Here the facts are different. Independent evidence was available and the prosecution has withheld such evidence from the record of the trial court. Therefore, when the independent evidence was available, it would not be a prudent act to depend upon the sole testimony of a child witness in absence of such corroborative evidence. So far as the other witnesses are concerned, admittedly they are not the witnesses to the incident. As said above, Hemchand Sindhi was only a panch witness and he was not at the scene of offence when the offence was committed. On the contrary, his case was that he has reached the spot on being informed by Lilaben. Therefore, admittedly, he had no idea as to how the event took place. Then there is evidence of Sangita at exh.8, and of Bai Panchu at exh.9. Both were absent when the offence was committed as they had gone for shopping and admittedly they were not present when the offence was committed. Therefore, they could not give evidence as to how the offence was committed. Apart from the said aspect of the case, it is also in evidence that Bai Panchu had some previous litigation and cases with the present respondent. There were chapter cases and other litigations between Bai Panchu and the present respondent. This shows the enmity between the two. Therefore, also the court has to be slow in accepting the versions tendered by the child witness. Another aspect of the case is that apart from the cases between Bai Panchu and the present respondent, there were chapter cases filed against Bai Panchu at the instance of Police Officers. This also shows that Bai Panchu had involved herself in some criminal litigations and, therefore, also her evidence would be treated to be a weak evidence.

9. There is evidence of Gangumal Dhanamal at Exh.11. His hut is situated by the side of the hut of Bai Panchu and according to him, none was residing in the said hut and he was also not present at the time when the offence was committed. Therefore, he has not been able to throw any light on the facts of the case before us.

9. Witness Himansu Pathak at exh.13 is a Police Sub-Inspector who had investigated the case. Naturally, he cannot prove the event against the respondent. Then

we find evidence of Nanjibhai at Exh.18, who had recorded the FIR lodged by Bai Panchu at 17.40 hours on 9.5.1984. He says that he has recorded the FIR as per the instructions given by Bai Panchu and thereafter, he had obtained the thumb mark in the FIR at Exh.10. Thereafter, the investigation was entrusted by him to PSI Pathak. Therefore, his evidence would not be material for proving the fact that the offence was committed by the respondent or whether or not the hut was burnt by the respondent.

10. Thereafter, the respondent has examined Vithaldas Joshi at Exh.21 as his witness. He is working as Head Constable in Palanpur City Police Station. He has produced the FIR of Palanpur City Police Station C.R. No.313/83 and C.R. No.100/84 at Exh.22 and 23 respectively. Exh.22 is the FIR filed against Bai Panchu and Sangita along with other accused persons for offence punishable under sections 323 and 342 read with section 114 of IPC, Sonal is shown to be the complainant in the said FIR and the offence is said to have been committed on 15.4.1984 at 13.00 hours and the FIR was filed at 23.30 hours on the said day. Another FIR at Exh.23 has been filed against Bai Panchu on 14.8.1983 at 20.15 hours for offence punishable under sections 66 B and 65 E of the Bombay Prohibition Act alleging that the said Bai Panchu was found in possession of illicit liquor in her hut. These facts would show that Bai Panchu was involved in certain criminal offences also.

11. Apart from the said event, the fact remains that the case of prosecution solely depend upon the oral testimony of Bai Lilaben, a child witness. Learned Sessions Judge has recorded the evidence of this child witness on overall appreciation and he has found that her evidence is not acceptable.

12. In these circumstances, we are of the opinion that when the case solely depends upon the oral testimony of a child witness and when the said witness does not understand the sanctity of oath and when other independent evidence was available and when such evidence is not brought on record, then it would not be prudent to rely upon the sole testimony of the child witness in order to reverse the acquittal and to convict the present respondent for the aforesaid offence, particularly when there was previous enmity between the respondent and Bai Panchu. Bai Panchu was also involved in certain criminal cases. In that view of the matter, the approach of the learned Sessions Judge acquitting the present respondent does not appear to be illegal or erroneous and we are of

the opinion that the said judgment also cannot be said to be illegal. Consequently, there is no merit in the present appeal and the same deserves to be dismissed. Even otherwise, when the Appellate Court broadly agrees with the reasoning of the trial court, then, it is not necessary to go into detailed discussion of the evidence on record and to reiterate the findings of the learned Sessions Judge as observed in decisions of the Supreme Court in the case of State of Karnataka v. Hemareddy & Anr. reported in AIR 1981 SC 1417 and in the case of Girijanandini v. Bijendra Narain, reported in AIR 1967 SC 1124. The learned APP has failed to dislodge the findings of fact recorded by the learned Sessions Judge for acquitting the respondent and, therefore, the acquittal appeal is liable to be dismissed.

For the foregoing reasons, there is no substance in this appeal and the same is accordingly dismissed.

15.3.2001 [J N Panchal, J.]

msp [D P Buch, J.]